St. John's Law Review

Volume 40
Number 1 *Volume 40, December 1965, Number 1*

Article 50

April 2013

CPLR 3103: Non-Resident Defendant Entitled to Reimbursement for EBT Expenses

St. John's Law Review

In the prior case, Colbert was the defendant and Home Indemnity, his insurer, had secured reports of the accident which reports were in the files of a former agent at the time of the institution of the present action. The court held that the reports sought were "material and necessary in the prosecution" of plaintiff's action and therefore were a proper subject for disclosure. In distinguishing this situation from the one in *Finegold*, the court stated that in the *prior* action defendants were working primarily for plaintiff (in the instant case) when they gathered the evidence sought to be disclosed here, and that, therefore, it was immaterial where they (defendants) stood in the *present* action.

No protection for the non-liability insurer

In *Raylite Elec. Corp. v. New York Fire Ins. Co.*,[187] plaintiff-insured sought discovery of the reports prepared for the defendant-insurer by a fire adjuster and a property damage expert. The court held that such reports did not become "material prepared for litigation" merely by virtue of their being turned over to an attorney. The court distinguished this case from *Kandel* solely on the ground that no liability insurance was involved herein. Thus, it would appear that where other than liability insurance is involved, the party seeking to preclude disclosure must show that the material was in fact prepared for the express purpose of litigation and not merely in the ordinary course of business unmotivated by the thought of litigation. Situations can certainly be imagined wherein a *non-liability* insurer could be doing work which could more easily be classified as "material prepared for litigation" than that of a *liability* insurer. In such situations, the net result of these cases is that the non-liability insurer would be put to the proof on the question of whether the work is material prepared for litigation whereas the liability insurer would enjoy a presumption (if not a conclusion) that it is. Such, however, is the present state of the law.

CPLR 3103: Non-resident defendant entitled to reimbursement for EBT expenses.

The notion that protective orders are not a proper means for requiring one party to pay the other's disclosure expenses [188] seems to be losing strength. An indication of this can be found in *Buffone v. Aronson* [189] wherein defendant Aronson, a resident of

---

[187] 46 Misc. 2d 361, 259 N.Y.S.2d 641 (Sup. Ct. Bronx County 1965).

[188] Pakter v. Eli Lilly & Co., 19 App. Div. 2d 810, 243 N.Y.S.2d 425 (1st Dep't 1963), would appear to convey such a notion.

[189] 45 Misc. 2d 454, 257 N.Y.S.2d 47 (Sup. Ct. Westchester County 1965).

Massachusetts, requested that the place of an EBT be changed to Massachusetts and, in addition, that plaintiff and co-defendant pay his attorney's expenses. The court denied these requests [190] since defendant Aronson was subject to examination in New York as a party to the action pursuant to CPLR 3110(1), and since there were no unusual circumstances present which would work a hardship on him.[191] However, the court did require reimbursement to defendant of his travel expenses incurred in attending the EBT since he neither stood in the shoes of a plaintiff nor interposed a counterclaim. That this was ordered by the court on its own initiative is not unusual since implied authority is provided therefor in CPLR 3101(a).

CPLR 3103: Inapplicable to CPLR 3123 in advance of trial.

In *Schwartz v. Macrose Lumber & Trim Co.*,[192] defendant sought a protective order [193] so as not to be required to answer questions in plaintiff's notice to admit.[194] The court in denying defendant's motion held that CPLR 3103 was inapplicable to CPLR 3123 in advance of trial. It stated that 3123 is virtually a re-enactment of CPA § 322 and that the cases interpreting the latter section precluded an attack on a notice to admit.[195] Therefore, the court reasoned that the same conclusion would have to be reached under the CPLR.[196] It would appear from an examination of 3103(a) that a strong argument can be made for granting a protective order to prevent the testing of a notice to admit in advance of trial.[197] The subdivision is broadly worded:

> The court may *at any time* . . . make a protective order denying, limiting, conditioning or regulating the use of *any* disclosure device.[198]

Such wording would not appear to warrant the unequivocal statement made by the court that 3103 does not permit such an attack upon a notice to admit. On the contrary, the language of 3103(a)

---

[190] CPLR 3110(1) renders any party to an action subject to examination "where the action is pending."

[191] CPLR 3103(a) governs such situations.

[192] 46 Misc. 2d 202, 259 N.Y.S.2d 289 (Sup. Ct. Queens County 1965).

[193] The protective order was sought pursuant to CPLR 3103.

[194] Plaintiff's notice to admit had been served pursuant to CPLR 3123.

[195] As authority for this statement, the court cited Belfer v. Dictograph Prods., Inc., 275 App. Div. 824, 89 N.Y.S.2d 125 (1st Dep't 1949), and Langan v. First Trust & Deposit Co., 270 App. Div. 700, 62 N.Y.S.2d 440 (4th Dep't 1946), *aff'd without opinion*, 296 N.Y. 1014, 72 N.E.2d 723 (1947).

[196] See 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3123.09 (1964).

[197] See 7B McKINNEY'S CPLR 3123, supp. commentary 41 (1965).

[198] CPLR 3103(a). (Emphasis added.)